No. 04-939

IN THE

Supreme Court of the United States

MARY ANN MCGUIRE, RUTH SCHIAVONE, AND JEAN B. ZARRELLA,

Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Massachusetts argues that its no-approach-to-speak law is "largely" modeled on the statute sustained in *Hill* v. *Colorado*, 530 U.S. 703 (2000). As the petition explains, Massachusetts' law goes beyond *Hill* in two important respects. First, it restricts "approaches" for the purpose of speaking only in the area around abortion clinics. Second, it discriminates on its face between different viewpoints, expressly permitting unconsented speaking approaches by "employees or agents of [an abortion] facility acting within the scope of their employment." Mass. Gen. Laws ch. 266, § 120E½(b)(2). Those extensions of *Hill*, which the government euphemistically calls the Act's "unique features" (Opp. 14), are constitutionally fatal.

The State defends a speech restriction triggered by proximity to abortion as "content neutral," but its argument ignores the reasoning in *Hill*. As to viewpoint neutrality, the State all but concedes that its statute is unconstitutional as written. It offers only a non-binding, counter-textual "construction" that purports to *broaden* the speech-restrictive effects of the Act, but in fact can do nothing to remedy the differential chill that the statute itself imposes on petitioners' speech. In the end, the State opposes review principally on the ground that to date only Massachusetts has been so cavalier in exceeding the constitutional boundaries marked out in *Hill*. That fact does not make the State's violation of the First Amendment—and the decisions below upholding it—any less worthy of review.

1. Respondents argue (Opp. 17-20) that the Massachusetts Act is content-neutral for two reasons: because it "restricts only conduct," rather than speech, and because "the harms [the state legislature] sought to address arose specifically at freestanding [abortion] clinics." Opp. 17, 18 n.12. Both arguments ignore the reasoning in *Hill*.

Although the Act's "no approach" aspect lends it a "conduct" veneer, the Act bans an unconsented "approach" only if it is made "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with" the person approached. Pet. 2 (Act § 120E½(b)). The Court's opinion in *Hill* expressly recognized that such a restriction affects core speech interests because it "unquestionably lessen[s]" petitioners' "ability to communicate effectively with persons in the regulated zones." 530 U.S. at 715; *see id.* at 708, 714-715.

Moreover—and unlike in *Hill*—the Massachusetts Act restricts speech in only one "regulated zone[]": outside abortion clinics. The State argues that this is permissible because these were the only locations where it needed to restrict speech to protect "public safety and access to medical care." Opp. 18-19. The reference to "public safety" is a canard: No one has ever questioned the State's ability to prohibit violence, intimidation, or obstruction, which are fully

addressed by *other* provisions. *See, e.g.*, Opp. 2 n.3; *see also* Mass. Gen. Laws ch. 265, § 37 (prohibiting intimidation or interference with exercise of constitutional right); Mass. Gen. Laws ch. 266, § 120E (prohibiting obstruction of access to any medical facility). In contrast, the state interests in protecting access and a zone of privacy for potentially vulnerable patients, on which this Court relied in *Hill*, are presumptively legitimate. *See* 530 U.S. at 716-718. But *Hill* makes clear that when a State seeks to protect those interests *in a way that burdens speech*, it must meet a higher standard than might apply in other contexts.

As the petition explains (Pet. 14-16), *Hill* carefully noted that because Colorado's no-approach-to-speak statute applied outside all health-care facilities, it did not "distinguish among speech instances that are similarly likely to raise" the concerns the State purported to be addressing. 530 U.S. at 724. "What [was] important [was] that all persons entering or leaving health care facilities share[d] the interests served by the statute." *Id.* at 731. Because the statute applied equally outside all such facilities, there was no "significant number of communications, raising the same problem that the statute was enacted to solve, that [fell] outside the statute's scope, while others [fell] inside." *Id.* at 723. And it was "precisely because" the state legislature had made such a "general policy choice" that the statute was subject to intermediate rather than strict scrutiny. *Id.* at 731.

The "comprehensiveness" of Colorado's restrictions provided the *Hill* Court with "evidence against there being a discriminatory governmental motive." 530 U.S. at 731. Massachusetts, in contrast, has asserted essentially the same state interests as Colorado, but has limited its speech restrictions to the area around freestanding abortion clinics. That limitation "distinguish[es] among speech instances that are similarly likely" to implicate the State's purported concerns; and it does so on a basis that correlates principally, if

not exclusively, with the probable content of the restricted speech. *See id.* at 724.[1] This disconnect between the State's asserted interests and the scope of its speech restrictions is at the core of petitioners' argument that the Massachusetts Act is not "content neutral." *See* Pet. 13-17. Yet the brief in opposition does not address it at all.

2. The petition points out (Pet. 18) that in agreeing to apply intermediate scrutiny to Colorado's no-approach-to-speak law, *Hill* set an appropriately high standard of viewpoint neutrality:

> [The Colorado statute] applies to all 'protest,' to all 'counseling,' and to all demonstrators whether or not the demonstration concerns abortion, and whether they oppose or support the woman who has made the abortion decision. *That is the level of neutrality that the Constitution demands.*

530 U.S. at 725 (emphasis added). The Massachusetts Act, in contrast, generally prohibits unconsented "approach[es]" made outside abortion clinics "for the purpose of" speaking (through leaflets, signs, or "oral protest, education or counseling")—but then specifically exempts from that prohibition "employees or agents of such [clinic] acting within the scope of their employment." Pet. 2-3 (Act § 120E½(b)). That exemption (among others) makes the Act viewpoint-discriminatory on its face. Pet. 19-20.

Indeed, the State does not even attempt to defend the Act as written. *See* Opp. 20-22. It effectively concedes that the Act can avoid "reflect[ing] . . . impermissible bias" only if

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[1] As set forth in the Petition at 17, *Frisby* v. *Schultz*, 487 U.S. 474 (1988), provides a useful comparison on this point. While the law in *Frisby* was prompted by protests at an abortion doctor's house, the town restricted speech at *all locations* where citizens shared the same asserted interest in residential privacy. *Id.* at 476-477. If the town in *Frisby* had used the logic offered here by Massachusetts, it would have restricted speech only "outside the homes of abortion doctors" (because that is where the protests were located) instead of at all residences where citizens had an interest in residential privacy.

it is applied using an "interpretation" developed by the Attorney General during this litigation. Opp. 22. On that "view[]" of the Act, clinic agents "in the restricted area *cannot* 'express their views about abortion or otherwise [] engage in protest, education or counseling.'" *Id.* (emphasis added); *see also id.* at 16 (describing construction), 21 n.14 (urging use of the "Attorney General's content-neutral interpretation" as an appropriate "'limiting construction'"); Pet. App. 50a. This sleight-of-hand cannot save the Act.

First, the State cannot salvage a facially discriminatory statute by proffering an "interpretation" that directly contradicts the Act's own terms. The Act bans only unconsented approaches made *for the purpose of speaking*. Pet. 2 (Act § 120E½(b)). It *exempts* from that ban clinic agents "acting within the scope of their employment." Pet. 3 (Act § 120E½(b)(2)). The Attorney General cannot "interpret" that exemption to mean that the Act actually prohibits speech-related approaches by the "exempted" persons after all. Executive officers, like courts, "may choose only between *reasonably available* interpretations of a text." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 471 (2001) (emphasis added).[2]

Second, petitioners' right to speak on equal terms cannot be protected by a purported executive interpretation that does not bind any organ of the State—including the At-

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[2] Massachusetts law is no more hospitable to counter-textual interpretation of statutes. *See, e.g.*, *Rosenbloom* v. *Kokofsky*, 369 N.E.2d 1142, 1143-1144 (Mass. 1977) ("The scope of the authority of this court to interpret and apply statutes is limited by its constitutional role as a judicial, rather than a legislative, body.... We cannot interpret a statute so as to avoid injustice or hardship if its language is clear and unambiguous and requires a different construction."); *Bronstein* v. *Prudential Ins. Co.*, 459 N.E.2d 772, 776 (Mass. 1984); *Bay State Gas Co.* v. *Local No. 273, Util. Workers Union*, 611 N.E.2d 249, 251 (Mass. 1993) ("If the Legislature has intentionally omitted a provision from a statute, no court may then reintroduce it.").

torney General himself. *See* Pet. App. 30a.[3] Here, the Attorney General has never even embodied his "interpretation" in a formal opinion—despite an express invitation from the district court. *See* Pet. App. 69a n.11; Mass. Gen. Laws ch. 12, § 3; *see also* 1979-80 Mass. Op. Att'y Gen. No. 17, at *1 n.2. Certainly he has never submitted his theory to the state courts, either in an actual prosecution or by invoking his right to seek a definitive advisory ruling from the Massachusetts Supreme Judicial Court. *See* Mass. Const. pt. 2, ch. 3, art. 2. It is thus ironic for the State to argue here (Opp. 15-17) that petitioners should patiently abide the differential restriction of their First Amendment rights because the state courts have not yet had an opportunity to reject the Attorney General's implausible construction. Moreover, in contrast to any conventional "limiting" construction, the Attorney General's novel theory involves his hypothetical ability (and willingness) to *expand* the apparent scope of the statute's speech restrictions by prosecuting *someone else* who is situated differently from the present petitioners. Thus, petitioners would have no way to force the issue themselves, even if they were prepared to brave criminal prosecution to do so—something that, of course, a plaintiff is normally *not* required to do in order to vindicate First Amendment rights. *See, e.g.*, *Steffel* v. *Thompson*, 415 U.S. 452, 459 (1974).

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[3] *See also Stenberg* v. *Carhart* 530 U.S. 914, 940 (2000) ("[O]ur precedent warns against accepting as 'authoritative' an Attorney General's interpretation of state law when 'the Attorney General does not bind the state courts or local law enforcement authorities.'" (quoting *Virginia* v. *American Booksellers Ass'n, Inc.*, 484 U.S. 383, 395 (1988)); *see also, e.g.*, *North Carolina Right to Life, Inc.* v. *Bartlett*, 168 F.3d 705, 711 (4th Cir. 1999) ("[Plaintiff's] First Amendment rights would exist only at the sufferance of the [executive official]. It has no guarantee that the [official] might not tomorrow bring [his] interpretation more in line with the provision's plain language."); *Kucharek* v. *Hanaway*, 902 F.2d 513, 519 (7th Cir. 1990) (Attorney General may "change his mind . . . and he may be replaced in office").

Third, the Attorney General's "interpretation" is premised on the notion that the Act's exemption for clinic agents protects them only "when they approach *and speak to* a patient as necessary to help the patient safely *access the clinic* (*i.e.*, when escorts are 'acting *within the scope of their employment*')." Opp. 16 (emphasis added).[4] On that (implausible) reading, the government would allow private *speech* that "promotes the State's neutral legislative goals of 'preserving personal security, and affording safe access to [abortion] services'" (Opp. 22), while threatening to imprison citizens on the same public sidewalk who peacefully approach the same listeners to offer access to alternatives such as adoption, or alternative sources of support such as free maternity clothes and medical care. *See* Br. of *Amicae Curiae* Dr. Alveda King et al. at 3-7. Yet, the First Amendment prohibits precisely this sort of viewpoint discrimination. *See Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("In the realm of private speech or expression, government regulation may not favor one speaker over another.").

The Attorney General seeks to restrict the "scope of employment" of clinic agents to physically assisting with access to the clinic, excluding any pro-clinic "protest, education, or counseling." Opp. 16, 22. Nothing in the Act supports such a limitation. The scope of a clinic agent's employment is defined by the clinic, not the Attorney General. C.A. App. 680 (Attorney General's Statement of Undisputed Facts).[5] Indeed, with respect to clinic agents, the only clear

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[4] The "scope of employment" language does nothing to limit the discriminatory effect of the Act's exemption for "persons entering or leaving" an abortion clinic, which contains no similar limitation. The State has expressly sought to take advantage of that additional exemption. *See* C.A. App. 503 ("When you bring patients to the door of the clinic you should walk into the vestibule with them and then turn around and come back out. The reasons for this (if there are any) are complex. However, the police want the escorts to walk into the building.").

[5] While the State cites the asserted post-Act policy change of one clinic in this regard (Opp. 7), it offers no reason why either petitioners or

effect of the "scope of employment" limitation is to *guarantee* that the "protest, education, or counseling" specifically permitted by the Act will be from the official viewpoint of a freestanding abortion clinic.[6]

3. For these reasons (and those stated in the petition), respondents cannot sustain their position (Opp. 15) that the First Circuit merely "faithfully applied *Hill*" in this case. In the end, therefore, they oppose review principally on the basis that any error in upholding the Massachusetts Act is unimportant because it affects only speech in Massachusetts and the First Circuit, and amounts to nothing more than "incorrectly appl[ying] this Court's settled First Amendment precedent to two particular features of the Massachusetts" Act. Opp. 13.

In *Hill* itself, as the petition points out (Pet. 23), this Court granted review "[b]ecause of the importance of the case." 530 U.S. at 714. After careful review it sustained a statute with features that, the Court explained, sufficiently demonstrated "the level of neutrality that the Constitution demands." *Id.* at 725. Massachusetts has now passed a statute that has all the speech-restrictive vices of the statute upheld in *Hill*, but that is *not* neutral as to either content or viewpoint. The First Circuit has upheld that Act in opinions that depart from basic First Amendment precepts, can only sow error and confusion in the law and, if not reversed, en-

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this Court should take comfort from voluntary, mid-litigation restraint by a single clinic that no doubt realized (more than seven months after litigation commenced (*see* C.A. App. 875)) that its earlier express instructions to "remind" incoming patients, for example, that "the majority of people support her right" (*id.* at 908; *see also*, Pet. 8-9), might be problematic for the State's position in this case.

[6] This point explains why "[p]etitioners have not challenged the police officer exemption as viewpoint based." Opp. 21-22. Limiting an exemption for police officers' speech to the "scope of their employment" tends to confirm its viewpoint neutrality because the police generally do not have an official viewpoint on abortion that it is part of the officers' job to express. Just the opposite is true for an exemption that covers abortion-clinic agents.

courage other States to follow Massachusetts' lead.[7] Those transgressions of *Hill*'s limits impermissibly burden petitioners' right to speak on issues of vital importance both to the public and to the women that petitioners seek to assist. They fully warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[7] That prospect is hardly speculative. At the First Circuit, five other States—Connecticut, Colorado, Maryland, Nevada, and New York—submitted an *amicus* brief arguing they had "significant interests" in the case because a decision upholding the Massachusetts Act "may serve as a precedent for similar legislation in other states." Br. of *Amici* States in Support of the Defendants-Appellants and Reversal of the District Court, No. 00-2492 (1st Cir. filed Mar. 27, 2001).